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SUPREME COURT
STATE OF WASHINGTON
2006 OCT 10 2:29

BY C.J. MERRITT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
Respondent,) NO. 77706-3
)
vs.) STATE'S RESPONSE TO
) MOTION TO STRIKE
JOHN COLEMAN,)
)
Petitioner.)
)
)
)
)

1. IDENTITY OF RESPONDING PARTY

The State of Washington is the respondent in this appeal.

2. STATEMENT OF RELIEF SOUGHT

The Court should deny petitioner John Coleman's motion to strike.

3. FACTS RELEVANT TO MOTION

Coleman was convicted of two counts of first-degree child molestation. In April of 2004, several months before Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the trial court imposed exceptional sentences on both counts based upon two aggravating circumstances: an abuse of

trust and that the offenses were part of an ongoing pattern of sexual abuse. 13RP 10-11; CP 204. On appeal, Coleman argued that his exceptional sentences violated Blakely and that, upon remand, the trial court was restricted to imposing standard range sentences.

At the time that Coleman filed his brief, the Court of Appeals had already rejected his argument that a trial court could not empanel a jury to consider aggravating circumstances upon remand. In State v. Harris, 123 Wn. App. 906, 99 P.3d 902 (2004), the Court of Appeals, citing CrR 6.16 and RCW 2.28.150, held that "the courts of this state also have inherent authority to empanel juries to consider aggravating factors." 123 Wn. App. at 923. Accordingly, in its responsive brief before the Court of Appeals, the State cited Harris and argued that as long as the trial court complies with the requirements of Blakely, upon remand, it could consider imposition of an exceptional sentence. Brief of Respondent at 34.

Subsequently, in April of 2005, this Court in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), disapproved of Harris to the extent that it authorized the empanelling of a jury when a case was remanded for a new sentencing hearing. The Court expressly avoided addressing the issue of whether the trial court had the inherent authority to submit aggravating circumstances to a jury as part of a trial.

At the time Hughes was decided, the issue of whether the trial court had inherent authority to submit aggravating circumstances to a jury was before the Court in several consolidated cases: State v. Pillatos, Base et al., No. 75984-7, initially argued on March 24, 2005. After the legislature amended the Sentencing Reform Act and expressly provided for the submission of aggravating circumstances to a jury, the Court accepted additional briefing and heard argument in October of 2005 in State v. Pillatos, Base et al. as to whether these amendments could be applied retroactively.

In the meantime, on June 13, 2005, the Court of Appeals reversed one of Coleman's convictions, affirmed the other conviction, and, citing Hughes, held that "Coleman is entitled to be re-sentenced within the standard range." Slip op. at 11. The State filed a motion for reconsideration, requesting that the court delete the language that Coleman was entitled to a "standard range" sentence, noting that this issue was currently before the Court in Pillatos, Base et al.. The State's motion for reconsideration was denied.

Coleman petitioned this Court for review of the portion of the Court of Appeals' decision affirming one of his convictions. In its answer to Coleman's petition, the State sought review on the following issue: "[w]hether the trial court may impose an exceptional sentence at the re-sentencing hearing." State's Answer to Petition for Review at 1. Once again, the State noted that the issue

was already before the Court in Pillatos, Base et al.. The State's brief argument on the issue was devoted to a discussion of whether the recent amendments to the SRA could be applied retroactively.

On July 31, 2006, the State filed its supplemental brief. In that brief, the State argued that at the new trial, the State is entitled to seek a jury finding on whether aggravating circumstances exist because (i) the amendments to the SRA, providing for the submission of aggravating circumstances to a jury, apply retroactively and (ii) the trial court has the inherent authority to submit special verdict forms concerning the aggravating circumstances to the jury. Two months after the State filed its supplemental brief, and shortly before oral argument, Coleman moved to strike the portion of the State's supplemental brief arguing that the trial court has inherent authority to submit aggravating circumstances to the jury.

4. GROUND FOR RELIEF AND ARGUMENT

The State respectfully requests that the Court deny Coleman's motion to strike. The State has not raised a new issue, but rather provided an alternative argument supporting the issue of whether the trial court can impose an exceptional sentence upon remand. Under RAP 13.7(b), a party may not introduce a new issue after the petition for review is granted. The issue presented by the State in the answer to the petition was: "[w]hether the trial court may

impose an exceptional sentence at the re-sentencing hearing." State's Answer to Petition for Review at 1. The argument that Coleman seeks to strike directly relates to this issue. If the trial court has the inherent authority to submit the aggravating circumstances to the jury, then the trial court may impose an exceptional sentence upon remand.

If there is a technical deficiency in the State's Answer, it should not preclude consideration of the argument. The rules of appellate procedure are "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Moreover, "this court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision." State v. Cantu, 156 Wn.2d 819, 822, 132 P.3d 725 (2006). As the State has repeatedly noted in its briefing, this Court's decision in Pillatos, Base et al. will likely resolve the issue presented by the State. As a matter of law, should this Court hold in Pillatos, Base et al. that a trial court has the authority to submit aggravating circumstances to the jury, that decision will control Coleman's case upon remand. Indeed, this is true despite the language in the Court of Appeals' opinion restricting the trial court to a "standard range" sentence. See State v. Schwab, ___, Wn. App. ___, 141 P.3d 658, 663 (2006) ("One exception to applying the law of the case arises when there has been an intervening change in the law."); Coffel v. Clallam County, 58 Wn. App. 517, 521, 794 P.2d 513 (1990) ("The court should

also decline to follow a previous decision of its own or of a higher court if the controlling law changes between the time the decision was entered and the time the case is tried on remand."). Accordingly, given that this issue is already before this Court in Pillatos, Base et al. and the Court's decision in that case will likely govern Coleman's case upon remand, it is neither necessary nor appropriate to strike the argument as requested by Coleman.

For all the foregoing reasons, the State respectfully requests that the Court deny Coleman's motion to strike.

DATED this 10th day of October, 2006.

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Certificate of Service by Mail

Today I sent via fax machine to Oliver Davis, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, a copy of the STATE'S RESPONSE TO MOTION TO STRIKE , in STATE V. JOHN COLEMAN, Cause No. 77706-3, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

10/10/06
Date

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